

**No. 13-20-00261-CV**

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FILED IN  
13th COURT OF APPEALS  
CORPUS CHRISTI/EDINBURG, TEXAS  
8/31/2020 2:42:12 PM  
KATHY S. MILLS  
Clerk

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**In The Court Of Appeals**  
**Thirteenth District Of Texas At Corpus Christi**

CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING TO  
POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. &  
75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,  
*Plaintiff-Appellant*

v.

MAYSE & ASSOCIATES, INC.,  
*Defendant-Appellee.*

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**Plaintiff-Appellant’s Motion To Retroactively Extend Time To File Notice Of  
Appeal**

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Pursuant to Texas Rule of Appellate Procedure 10.5(b) and 26.3, Plaintiff-Appellant, CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 (“Underwriters”), respectfully submits this Motion to Retroactively Extend Time to File Notice of Appeal. In support of this request, Underwriters state as follows.

1. This matter involves Underwriters’ subrogation action, filed in the District Court for Aransas County, Texas (343<sup>rd</sup> Judicial District). The style of the case is *Certain Underwriters at Lloyd’s of London Subscribing to Policy No.*

*NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites v. K K Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC, and Mayse & Associates, Inc., Cause No. DC-15-12370.*

2. Underwriters are appealing the District Court's June 11, 2020 Order Granting Mayse & Associate, Inc.'s Motion to Dismiss for Violation of the Texas Certificate of Merit Law (*Tex. Civ. Prac. & Rem. Code*. §150.002).

3. Believing this appeal was subject to the 30-day period for commencing appeals in most civil cases, Underwriters filed their Notice of Appeal on July 10, 2020 (29 days after the underlying Order was entered).

4. Until August 31, 2020, Underwriters had no reason to believe their Notice of Appeal was untimely. Indeed, this appeal has progressed in the normal course, with a current due date for their Appellant's Brief being September 14, 2020.

5. On August 31, 2020, counsel for Underwriters contacted counsel for Defendant-Appellee Mayse & Associates ("Mayse"), seeking concurrence in two other motions Underwriters will be filing with this Court ( a Motion to Consolidate this appeal with a subsequently filed appeal arising out of the same matter, and a Motion to Extend the time for filing Appellant's Brief in this matter by 30 days). Mayse's counsel indicated it would not concur, as it was filing a Motion to Dismiss

this appeal because Underwriters failed to file their Notice of Appeal within 20 days of the District Court's Order.

6. It was not until this conversation with Mayse's counsel that counsel for Underwriters realized it had miscalculated the date for filing a Notice of Appeal, as an appeal of a dismissal under the Texas Certificate of Merit Law is considered an Accelerated Appeal under Texas R. App. P. 28.1.

7. Pursuant to Tex. R. App. P. 26.1(b), a Notice of Appeal for an Accelerated Appeal must be filed 20 days from the date the underlying Order was entered. Consequently, the Notice of Appeal in this matter was due July 1, 2020.

8. Underwriters' Notice of Appeal, filed July 10, 2020, was therefore 9 days late.

9. Pursuant to Texas Rule of Appellate Procedure 26.3, an appellate court can extend the time for filing a Notice of Appeal if, within 15 days of the original filing deadline, A) a Notice of Appeal is filed with the trial court, and B) a Motion to Extend is filed with the appellate court.

10. Underwriters satisfied the first Rule 26.3 requirement, as they filed their Notice of Appeal 9 days after the original filing deadline.

11. Underwriters technically did not satisfy the second Rule 26.3 requirement, as they did not file an actual Motion to Extend with this Court within that 15 day period. However, pursuant to the Texas Supreme Court and this Court,

“a motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by Rule 26.1, but within the fifteen-day grace period provided by Rule 26.3 for filing a motion for extension of time.” *Martinez v Navy Army Community Credit Union*, No. 13-19-00645-CV (Tex. Ct. App. - Corpus Christi-Edinburg 1/16/20)(2020 W.L. 241970). *See also Verburgt v Dorner*, 959 S.W.2d 615, 617-618 (Tex. 1997). Therefore, as a matter of law, Underwriters’ compliance with the second Rule 26.3 requirement is implied from the filing of their Notice of Appeal within the aforementioned fifteen-day grace period.

12. Even though Underwriters complied with the two requirements from Rule 26.3, they understand they still must provide this Court with a reasonable explanation for the late filing of their Notice of Appeal. *Martinez, supra*. The explanation is in two parts.

13. First, as Underwriters stated in their Notice of Appeal, when that was filed Underwriters also filed a Motion for New Trial, Motion to Modify the Judgment, and Motion for Reconsideration with the District Court. Moreover, another Defendant (DCI Engineers) had filed a similar *Tex. Civ. Prac. & Rem. Code*. §150.002 motion, although it had yet to be decided. As such, it was unclear to Underwriters whether the Notice of Appeal was premature (perhaps it best if

everything was decided regarding these two Defendants before commencing an appeal), let alone late. This uncertainty was a factor in Underwriters acting as it did.

14. Second, not realizing this was an Accelerated Appeal, Underwriters' counsel was unaware it had miscalculated the deadline for filing a Notice of Appeal. Underwriters' counsel apologizes for this oversight, which has been deemed a sufficient explanation for the late filing of a Notice of Appeal. *See Jordan and Associates v Wells*, No. 01-14-009920CV (Tex. Ct. App. - Houston 1<sup>st</sup> Dist 7/30/15)(2015 W.L. 4591786).

15. In light of these facts, Underwriters respectfully requests this error regarding the filing of its Notice of Appeal be corrected via a retroactive extension of the deadline for filing a Notice of Appeal to July 10, 2020 (the date the Notice of Appeal was filed). An inadvertent 9 day delay in Underwriters' filing their Notice of Appeal is hardly an example of dilatory conduct by Underwriters, nor does it realistically prejudice Mayse in any way (other than it not being able to escape appellate review of the District Court's order on a procedural defect). Indeed, Mayse's delay in seeking dismissal of this appeal is further evidence of this fact.

16. On August 31, 2020, Underwriters' counsel conferred with counsel for Mayse regarding concurrence in several other motions Underwriters will be filing with this Court. Since Mayse's counsel has indicated it will be filing a motion to

dismiss this appeal based on the late filing of a Notice of Appeal, it obviously will not be concurring in the relief requested.

WHEREFORE, Plaintiff-Appellant Underwriters respectfully requests that their Motion to Retroactively Extend Time to File Notice of Appeal for n days be granted, such that Underwriters' July 10, 2020 Notice of Appeal is considered timely filed.

Respectfully submitted,

**DENENBERG TUFFLEY**

/s/ Paul B. Hines

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Subscribing To Policy No. NAJL05000016-  
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Inc. & 75 and Sunny Hospitality d/b/a  
Fairfield Inn & Suites*

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Associated Case Party: KK Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC and Mayse & Associates, Inc.

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